close of the case the Magistrate called upon the appellant to show cause why he should not be punished for contempt of court committed in *facie curiae* by giving false evidence. He was convicted and on appeal it was held, following *In re Puteh,* that in such a case an appeal does not lie and the Supreme Court has no power to revise the conviction or sentence. During the course of his judgment McElwaine, C.J., said:—

"I am inclined to think that contempt in *facie curiae* by giving false evidence is a criminal matter, but even if it is it may well be that s. 302 is not intended to cover such a case as the present. In addition to the inference Braddell, J. found in the provision that summary fines must be reported to the Attorney-General, which can only be with a view to executive action which would hardly be necessary if an appeal lay, I would refer to sections 279-385 dealing with other criminal offences which may be dealt with as contempts when committed in *facie curiae.* An appeal is given by s. 384 which would not be necessary if the Legislature had considered the matter covered by s. 302."

It would appear that in these circumstances also the remedy of the person aggrieved is limited to Executive action.

The facts of these cases are essentially different from the facts in the present case. *Koay Ban Siew's case* can be distinguished from the present case because, firstly, in the present case the complainants were themselves witnesses for the prosecution, and secondly, in acting under section 74 of the Criminal Procedure Code it was incumbent upon the learned President to call upon the complainants to show cause why an order should not be made which was not so under the Customs Enactment, 1936. The remedy of the owner of the junk was as I have said to make out a case to the Executive for the return of the forfeited junk.

The cases of *In re Puteh*[3] and *Narayanasamy v. The King*[4] can be distinguished from the present case in that the Oaths Ordinance was held to be outside the scope of the Criminal Procedure Ordinance, 1900, and the Criminal Procedure Code respectively (the relevant provisions of which were substantially similar). In the present case the action taken by the learned President was by virtue of the powers contained in the Criminal Procedure Code (s.74), that is the same legislation giving a right of appeal from which it follows that any right of appeal is governed by section 302.

I can find no other authority which has any bearing on the question.

Section 74 reads as follows:—

"74.—(1) If during or after the trial of a case the Court is of opinion that the conduct of a complainant is or has been such that it is necessary to call upon him to show cause why he should not enter into a bond to keep the peace for such period not exceeding six months as the Court thinks fit to fix, the Court may summarily call upon him to do so.

(2) The evidence upon which the Court decides to call upon a person to show cause under this section shall be read to the person so called on, but it shall not be necessary to recall any witness unless the person called upon desires to cross-examine the witness.

(3) The case to show cause under this section may, as the Court sees fit, proceed as either part of the case out of which it has arisen or as a separate proceeding."

It will be seen that the complainants must be called upon to show cause, that is to say, they must be called upon to answer the accusation that it is necessary in order to ensure that they keep the peace that they should enter into a bond so to do for a specific period. The Court must read to them the evidence upon which it has decided to call upon them to show cause and the complainants have a right to recall any witness for the purpose of cross-examining that witness. This right in itself suggests that they are parties. Sub-section (3) contemplates that this proceeding or matter may proceed either as part of the case out of which it has arisen or as a separate proceeding. This is presumably a matter of procedural convenience, but it seems to me that if the matter takes place as a separate proceeding, the complainants must *ipso facto* be parties to that proceeding. If this is so it would be most unreasonable to consider that if the proceeding takes place as part of the case out of which it has arisen the complainants are not parties and in my view in such circumstances the proceedings comprise a case within a case to which the complainants are parties.

Accordingly I hold that the complainants have a right of appeal under section 302 of the Criminal Procedure Code.

Order accordingly.

Solicitors: *Allen & Gledhill.*

BUILDING & ESTATES LTD. v. A. M. CONNOR

[O. C. J. (Whyatt C.J.) December 19, 1957]

[Singapore — Suit No. 1128 of 1956]

Contract — Building contract — Lump sum contract — Work defective and quality inferior — Right to repudiate — Refusal to pay balance on completion — Doctrine of substantial performance.

The plaintiffs claimed from the defendant a sum of $4,803 being the amount of the purchase money which remained unpaid in respect of a house which the plaintiffs built for the defendant pursuant to an agreement whereby the defendant agreed to buy a plot of land together with the house to be erected thereon for a lump sum of $21,492. The defendant went into occupation of the house but refused to pay the balance of the purchase price on the ground that it was not built according to specification and much of the work was defective and of inferior quality. She therefore denied liability for the sum claimed and furthermore counterclaimed for the sum of $12,063 which she said must be expended on the house to make it correspond with the specification.

Held: in an action on a contract to build a dwelling house in accordance with the specification and plans in the contract for a lump sum payable on completion the defendant cannot refute the liability on the ground that, the work, though substantially performed, is in some respects not in accordance with the specifications and plans forming part of the building contract, and therefore the defendant in this case was liable for the balance sued for, less a deduction based on the costs of making good the defects and omissions proved.

Cases referred to:—

(1) *Boone v. Eyre* 126 E.R. 160.

(2) *Hoenig v. Isaacs* (1952) 2 All E.R. 176.

(3) *H. Dakin & Co. Ltd. v. Lee* (1916) 1 K.B. 566.

ACTION ON A CONTRACT.

K. E. Hilborne for the plaintiffs.

A. Muthuswamy for the defendant.

Cur. Adv. Vult.

Whyatt C.J.: — In this case the plaintiffs, an estate development company, claim from the defendant, Mrs. Connor, the sum of $4,803, this being the amount of the purchase money which remains unpaid in respect of a house known as, No. 3 Thomson Rise Estate, which the plaintiffs built for her pursuant to an agreement dated the 25th May 1955. The defendant went into occupation of the house in January 1956 and has lived in it ever since but she has refused to pay the balance of the purchase price on the ground that the house was not built according to specification and much of the work was defective and of inferior quality. She therefore denies liability for the sum of $4,803 and furthermore counterclaims for the sum of $12,063 which she says must be expended on the house to make it correspond with the specification.

The first question to be decided is whether the plaintiffs are entitled to sue for the balance of the purchase price, assuming for the purpose of argument, the house has not been built exactly according to specification. The answer to this question depends upon the construction of the agreement entered into between the plaintiffs and the defendant in May 1955. It is an agreement for the sale of a plot of land together with the house to be erected thereon for a lump sum of $21,492, and if the ordinary rule governing the discharge of contracts by performance were to be applied it would be necessary for the plaintiffs to show that they had performed their obligations completely and precisely before they could recover anything for the work they have done. The rigour of the common law rule requiring exact performance by the promisor as a condition precedent to his right of recovery under a lump sum contract has been modified to some extent by judicial decisions during the course of the last century and it is now well established that in certain circumstances a promisor who has substantially performed his side of the contract may sue on the contract for a lump sum but, of course, remains liable in damages for his partial failure to fulfil his contractual obligations. The doctrine of substantial performance, as it has been called, is usually traced back to Lord Mansfield's judgment in *Boone v. Eyre*(1). It has been re-affirmed in many cases since that date, and I take as the most recent and authoritative statement of the law on this matter the judgment of Lord Justice Denning (as he then was) in *Hoenig v. Isaacs*(2) where the learned Lord Justice expressed himself thus:

". . . . the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions and is usually calculated by the cost of making them good".

There is, in my opinion, no doubt at all that the agreement in this case, upon its true construction, falls within the class of contract which Lord Justice Denning had in mind in this

passage. It is an agreement providing for the erection of a house and the sale of the plot of land on which it stands for a lump sum and as such it is, if not identical, at least very similar, in character to the contract in the case of *H. Dakin & Co., Ltd. v. Lee*[3] which Lord Justice Somervell (as he then was) stated in *Hoenig v. Isaacs, supra,* was a decision in which the true position on the construction of this class of contract was re-affirmed. Accordingly in my view the plaintiffs are entitled to sue the defendant for the contract price, on the basis, of course, that they can show that the work which they have done constitutes substantial compliance with the contract. On this point the evidence is, in my judgment, overwhelmingly in favour of the plaintiffs. The defects and omissions of which complaint is made by the defendant relate to a number of miscellaneous items many of them trivial or of only minor importance, and having listened to the evidence of the parties and their expert witnesses, and further, having had the advantage of inspecting the house myself, I am in no doubt that the defects and omissions which have been proved, whether taken singly or in the aggregate, are not such as to entitle the defendant to say that the plaintiffs have not substantially performed their promise under this contract. As Mr. Koren, an architect called by the plaintiff put it: "In its class, in this price category, this house is a perfectly sound dwelling." I agree with Mr. Koren's view and would only add that if I had felt any hesitation in accepting it, it would have been dispelled by my inspection of the house which left me with the impression that this dwelling, notwithstanding certain defects which I will deal with presently, is a sound and satisfactory structure. It follows, therefore, that the defendant is liable to pay to the plaintiffs the balance of the contract price, namely, $4,803, subject, of course, to the deduction of such sum as may be found due on the counterclaim.

Before dealing with the details of the counterclaim, I ought perhaps to mention briefly certain other defences to the plaintiffs' claim which were raised in the course of the defendant's somewhat discursive argument. It was said that the plaintiffs had agreed to give the defendant possession of the house by the 31st August 1955 whereas in fact she did not obtain possession until the middle of January 1956 but the plaintiffs' managing director, Mr. Wright denied any such agreement. It is significant that this term was not reduced into writing although the rest of the contract was in writing and that at no time did the defendant write complaining of the delay, although she made many other complaints in writing to the plaintiffs from time to time. I need say no more on this point than that I accept the evidence of Mr. Wright in preference to that of the defendant on this matter. A further objection raised by the defendant was that the plaintiffs had not obtained a certificate of fitness for habitation from the local authority in respect of this house before instituting these proceedings and therefore they were not entitled to the purchase price but as is evident from clause 2 of the conditions of sale, the contract provides an alternative to a certificate of fitness, namely, the entry of the purchaser into possession and as that is what happened in the present case it is clear there is no substance in this objection. Yet a further objection was that there was no water or electricity supply to the house when the defendant went into occupation on the 15th January 1956, the water not being connected until two days later and the electricity until April 1956. The answer to this objection is that the contract does not impose an obligation on the plaintiffs to supply water and electricity — that is the statutory responsibility of the local authority — but merely requires them to pay the necessary charges to secure a connection for the supply of water and electricity and there is no evidence that the plaintiffs failed to do what was required of them in this respect.

Having disposed of the defendant's various objections to the plaintiffs' claim, I now turn to consider the detailed complaints set out in the counterclaim. They consist of no less than 31 separate items but for the purposes of this judgment I propose to adopt the course which proved convenient at the hearing and group them under two heads, the first, (which I will call group A) comprising items 1 — 8, and the second, (which I will call group B) comprising items 9 — 31. The items in group A relate to the concrete floors inside the house, the concrete aprons and drains outside the house and some tiling on and surrounding the inside concrete floors. According to the evidence of the plaintiffs, the concrete floors, aprons and drains are perfectly satisfactory; as Mr. Koren put it: "the concrete floors appeared to be all right when I saw them yesterday; there was no evidence of any cracking or deterioration which I would expect to find if it was of poor quality after

being laid two years". Nevertheless the defendant claims that the whole of this concreted area, comprising the floors of the living room, dining room, 3 bedrooms, 2 bathrooms and boy's room inside the house, and the aprons and drains outside the house, totalling 2,282 square feet should be dug up and relaid at a cost of $8,577. The reason advanced by the defendant for this drastic measure is that the concrete is not made from a mix containing one part cement, two parts sand and four parts coarse aggregate, (or more shortly, a 1:2:4 mix) as specified in the contract.

Both parties called expert evidence as to the composition of the concrete but much of it was conflicting and inconclusive. One expert witness was, however, outstanding. He was Mr. Barden, an assistant engineer in the Public Works Department, a Bachelor of Science of London University and a member of the Institute of Civil Engineers. Although he was called by the defendant, his examination of the concrete at this house was not made at the defendant's request but under instructions of an adviser to Government on building standards and he may, therefore, be regarded as completely independent. He visited the defendant's house on the 22nd August 1957 and with the assistance of his staff took a sample from the floor of one of the bedrooms. He found that it consisted of first, a floated cement surface ⅛" thick, secondly, a cement mortar, (that is to say, a cement and sand), layer 1¾" thick, a further cement mortar layer 1" thick, and finally a concrete layer 1½" to 2½" thick; the two cement mortar layers had, in his opinion, been laid at different times. Thus, ignoring the ⅛" floating cement surface which is required only for smoothing the surface, this floor consisted of two layers of cement mortar (which contained no coarse aggregate) and a layer of concrete only 1½" to 2½" thick instead of a single layer of concrete 4" thick. It is not surprising that under pressure this sample failed at an early stage and that its strength was only 39% of concrete made from a 1:2:4 mix. In Mr. Barden's opinion, the concrete was unable to carry as much weight as concrete made in accordance with the specification and would be more likely to crack if there should be any shift in the foundations of the house. He summarised his conclusion with the words: "It was definitely not 1:2:4 mix and very inferior and non-uniform."

I accept his evidence on this point and indeed I think it is correct to say that the plaintiffs did not seriously challenge his conclusions in so far as they were confined to the particular sample which he tested. They contended, however, that the sample which he took was not a fair sample and that, therefore, no safe conclusions could be based on it. Mr. Barden insisted that the sample had been taken with great care and was a fair sample of the floor as a whole. He did not say, indeed he was not asked, if it was also a fair sample of the floors in the living and dining room and the other bedrooms, let alone the concrete aprons and drains. Something like 44 separate mixings were required to make the concrete for all the floors, aprons and drains in this house and it may well be that the mixings used for other concrete work were not below specification. It is true that there was some evidence from another expert regarding the concrete drains but it was not very convincing and I think it is fair to say that there was no reliable evidence as to the composition of the concrete in this house other than that given by Mr. Barden in respect of the floor of this particular bedroom. In this matter the onus rests upon the defendant and in my opinion she has failed to discharge it except as regards the floor of this one bedroom. In my judgment Mr. Barden's evidence establishes *prima facie* that the concrete used in this bedroom was below specification and there being no evidence in rebuttal, I find that the defendant has proved her case on this point. The measure of damages, as Lord Justice Denning said in *Hoenig v. Isaacs, supra,* is usually calculated by the cost of making good the defect. On this basis, the damages would be the cost of breaking up the existing cement floor, relaying it with 1:2:4 mix and replacing broken tiles. No precise calculation was made by either party of the cost of doing this work in this bedroom but on the basis that the area of the bedroom is approximately 200 square feet and that the cost of the work is proportionate to the area, I consider that a figure of $400 would cover this item. So much for the claim for damages under group A.

I now turn to consider group B. The first of the items in this group is item 9, requiring the plaintiffs to dig up and replace the present bitumen drive with a concrete drive. Mr. Wright, the plaintiffs' managing director, admitted that the present drive was different from the concrete drive specified in the contract but

maintained that it was a better drive in every way and moreover that the defendant's husband agreed to accept it in substitution for a concrete drive. There is no doubt it is a better drive than that specified in the contract. According to Mr. Koren, many people if they can afford it put in a tarmac drive instead of a concrete drive because it gives off less heat. Furthermore, the defendant was actually living in the house at the time the drive was laid and I am satisfied that it is a reasonable inference that the defendant, as well as her husband, knew and consented to a tarmac drive being laid instead of a concrete drive. The claim for this item, therefore, fails.

As regards item 10, Mr. Koren, the plaintiffs' witness, admitted the doors were defective. He estimated they could be re-set and re-hung properly for $24 and I accept this figure.

As regards item 11, the complaint is that there is a gap of 1½" between the floor and the door. The evidence of the defendant's architect supports this complaint and it accords with my own recollection when I visited the house. I do not regard a door which fits as badly as this one does as satisfactory. I accept the evidence that the cost of replacing this door with a door which fits properly would be $50.

As regards items 12 and 13, the plaintiffs admit these locks should be replaced with Union locks. I accept the evidence that the replacement would cost $32.

As regards items 14 and 15, it is admitted that these doors have strips of wood at the bottom to make them fit. I do not regard as satisfactory a door which has to have bits stuck on to it in this way to make it fit. If the plaintiffs had supplied doors made to proper measurements, this patchwork method of making them fit would have been unnecessary. I accept the evidence that the replacement cost would be $47.

Item 16 is a complaint about the fitting of the linen cupboard doors. I am not satisfied that there is anything wrong with them and I dismiss this item.

Item 17 relates to the kitchen sink. The plaintiffs admit that it is different from the specification, being metal instead of porcelain, but maintain that it is a better article; furthermore Mr. Wright states that before the sink was installed, the defendant inspected and approved an identical unit in his office and knew that this particular unit was going to be supplied. I accept Mr. Wright's evidence on this point and dismiss this item.

Item 18 is a complaint concerning the celotex ceiling boards. It is significant that as originally pleaded, the complaint was too vague to be comprehensible and the defendant had to apply to amend. Both Mr. Wright and Mr. Koren were of the opinion that this work was unnecessary. I am not satisfied that the complaint as it appears in the amended pleading is justified and I dismiss this item.

Item 19 is a trivial matter concerned with tightening the joints of some pipes. I accept the evidence that the work could be done for $5.

As regards item 20, the plaintiffs admit that it was a mistake to fit this kind of door to a bathroom and agree it must be replaced. I accept the evidence that the replacement cost would be $25.

Item 21 is a complaint that an access panel has not been fitted to the bath. I consider this complaint is well-founded. I accept the evidence that this work could be done for $22.

Item 22 relates to the wiring of roof-tiles. The plaintiffs admit this claim. I accept the evidence that this work could be done for $12.50.

Item 23 relates to a crack in the wall of the servant's room. The plaintiffs admit this claim. I accept the evidence that $10.00 would be sufficient to remedy this trivial defect.

Item 24 is a complaint about clamping the electric wires in the ceiling. I do not find this complaint substantiated and accordingly dismiss it.

Item 25 is a complaint that the steel windows have not been properly secured. I agree with Mr. Koren that it is perfectly ridiculous to suggest, as the defendants do, that $450 is required to deal with this complaint. All that is needed is that the empty bolt holes in the frames should be filled in, not for the purpose of securing the windows more firmly — they are already adequately secured — but for appearance's sake. I consider $10 is sufficient to cover this trivial complaint.

Item 26 is a complaint that some of the rooms have not been properly distempered and

the walls have been left with a streaky appearance. From my inspection it appeared to me there was little to complain of except in the lounge and dining room where the finish has a streaky appearance. No separate figure was given by either side for the cost of re-distempering the lounge and dining room only but on the basis that it would cost in the region of $250 to re-distemper all the rooms I award $50 to cover this item.

Item 27 relates to a bathroom door and is identical with item 20. I award $25 for this item.

Item 28 was abandoned by the defendant.

Item 29 is a complaint that some concrete slab covers were cracked but I do not find this complaint is substantiated.

Item 30 is a complaint that the turn up of the rendering on the flat roof has been omitted but I consider the evidence insufficient to substantiate the complaint.

Item 31 is the last item and is a complaint that the flat roofs have been badly made with insufficient slope. During the course of the hearing, Mr. Wright made a personal inspection of the flat roofs and ascertained that they had a fall visible to the naked eye and drained quite satisfactorily except for three flat spots of 4 square feet. This is a trivial matter and I consider $10 is adequate to cover the defect.

Thus the total amount of the damages for group A items is $400 and for group B items is $352.50. Mr. Koren, who gave estimates of the cost of certain group B items, considered his figures should be doubled if the defendant employed an independent jobbing builder instead of the plaintiffs who had an organisation on the spot. I think the proper measure is what the work would cost in the open market and on this basis, I think something should be added to the group B total. It is difficult to make a precise assessment of the amount required to be added to make up the difference between the cost of group B items if the plaintiffs do the work and the cost if the work is done at open market rates by an independent jobbing contractor as the difference in the case of certain items might depend upon the extent of the labour element in the cost of those particular items. However, after giving the matter the best consideration I can on the materials available, I am of the opinion the figure of $352.50 should be increased to $500.

I should perhaps mention two further heads of claim which appear in the counterclaim. The first is a claim for damages for the cost of moving out of the house while the repairs are being done. In view of my findings as to the small amount of repairs that have to be done, it would not be reasonable to move elsewhere while they are being carried out and in any case, as counsel for the defendant admitted such damages cannot be said to have been in the contemplation of the parties when the contract was made and must therefore be considered too remote. The second head is a claim for damages on account of the unsatisfactory state of the estate roads. The defendant, however, said in evidence that the estate roads were now "reasonably all right" and therefore, quite apart from the difficulties in law of establishing such a claim, it is clear that the evidence is insufficient to establish this claim.

In the result the plaintiffs are entitled to recover the sum of $4,803 less $900 for the defects and omissions, that is to say, a nett amount of $3,903. In addition the plaintiffs claim interest on the unpaid purchase money. Clause 5 of the contract provides that if from any cause whatever other than the wilful default of the vendor, the purchase is not completed within the time fixed for completion, the purchaser shall pay to the vendor interest on the unpaid balance of the purchase money at the rate of 6 per cent per annum for so long as the purchase money is unpaid. It follows from my finding in this case that the defendant was in default in not paying the plaintiffs $3,903.00 as from the date when she went into possession, that is to say, as from the 15th January 1956, and therefore the defendant is liable to pay interest at 6% per annum on that sum from 15th January 1956 until judgment. The amount of such interest should, if possible, be agreed by the parties but in default of agreement, the matter should be referred to the Registrar to determine the correct figure.

Accordingly I give judgment for the plaintiffs in these proceedings for the sum of $3,903.00 together with a sum for interest to be calculated as stated in this judgment.

Order accordingly.

Solicitors: *Hilborne & Co.; Muthu & Co.*